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IN THE

Supreme Court of the United States

OCTOBER TERM — 1970

No. 745

HOWARD LITTLE,
Petitioner,
vs.
CHARLES F. GREEN,
Respondent

BRIEF OF RESPONDENT ON PETITION OF WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

QUESTIONS PRESENTED

In this Brief, Petitioner, Howard Little, who was plaintiff in the District Court in and for the Middle District of Florida, and appellant in the Fifth Circuit Court of Appeals, will be referred to as the "Petitioner". Respondent, Charles F. Green, who was defendant in the District Court in and for the Middle District of Florida and appellee in the Fifth Circuit Court of Appeals, will be referred to as "Respondent". The following symbols will be used:

B - Brief of Petitioner, Howard Little

A - Appendix of Petitioner, Howard Little

Respondent cannot accept Petitioner's statement of the questions presented for review. They are couched in

language which is self-serving and assumes facts which have no foundation in the record or opinion rendered in the Fifth Circuit Court of Appeals.

It is believed that Petitioner has violated Section 5 of Rule 23(j)(4) of the Supreme Court Rules:

> No. 4 The failure of a Petitioner to present with accuracy, brevity and clearness whatever is essential to a ready and adequate understanding of the points requiring consideration will be a sufficient reason for denying his petition.

Although it is difficult to discern the precise complaints of petitioner, it is believed, based upon a thorough knowledge of this case and a Little "clairvoyance" the issues sought to be reviewed are as follows:

1. Whether the Fifth Circuit Court of Appeals' ruling concerning the statements made to the jury by Respondent's attorney requesting the jury to determine whether Green did anything "wrong" is erroneous.

2. Whether the Fifth Circuit Court of Appeals' ruling that the District Court did not err in instructing the jury as to the difference between liability based on negligence as opposed to breach of warranty of seaworthiness is erroneous.

Other sections of Petitioner's brief raise the issues of whether there existed unseaworthiness as a matter of law (B 20) and whether the District Court erred in failing to grant Petitioner's motion for a summary judgment and directed verdict. (B 19).

This type of approach would appear to violate Rule 23(c) of the Supreme Court Rules which does not permit the raising of additional questions other than those

set forth in "Questions Presented". Such argument should be disregarded. However out of an abundance of caution a rebuttal to these questions will be included in this brief.

STATEMENT OF THE CASE

Petitioner has not supplied the essential information in his statement of the case to support the issues raised in the Argument section of his brief. In an effort to clarify the issues, Respondent will partially assume this burden.

On November 21, 1968, the District Judge denied Petitioner's Motion for Summary Judgment. Before the Court at that time were the depositions of Little and Captain Pacetti of the ROVING GAMBLER. The affidavit of David G. Hanlon was also on file. Pacetti's and Little's testimony reflected the facts set forth in the Court of Appeal's Opinion. Pacetti in his deposition stressed that had Little not locked the friction lever on his ship's winch with his homemade "jury rig", the gear on the winch would have disengaged when Little's foot caught in it thus completely preventing any injury to the seaman. Hanlon's affidavit stated that the cause of the injury to Little was the placing of the "jury rig" over the friction handles of the winch and kicking the cable.

Little had testified on deposition that he did not kick the over-ride. He claimed that he slipped and fell into the winch. The rest of the material facts are fully set forth in the Circuit Court of Appeals' Opinion.

ARGUMENT

The grounds for this Court's granting certiorari are well known. They are essentially set forth in Rule 19(1)(b) of the Supreme Court Rules:

> Where a Court of Appeals has rendered a decision in conflict with the decision of another Court of Appeals on the same matter; or has decided an important state or territorial question in a way in conflict with applicable state or territorial laws; or has decided an important question of Federal law which has not been, but should be, settled by this Court; or has decided a Federal question in a way in conflict with applicable decisions of this Court; or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by lower court, as to call for an exercise of this Court's power of supervision.

None of these grounds are *apparently* asserted by Petitioner except conflict of the decision in the case sub judice with decisions of other District Courts. (B 3) Petitioner has failed to demonstrate any such conflict.

A. ALLEGED ERROR IN FAILING TO GRANT PETITIONER'S MOTION FOR SUMMARY JUDGMENT

The District Court's Opinion does not even mention the question of whether or not the District Court erred in denying Petitioner's Motion for Summary Judgment. The three issues decided by a Court of Appeals were stated in its opinion as follows:

> "In his brief and argument here, Little urges reversal on three points: (1) The vessel was unseaworthy as a matter of law. (2) Counsel for defendant, in his opening statement and closing argument, mis-stated the law applicable to unseaworthiness by intimating that the jury must find that

> Green had done something "wrong" in order for Little to recover and the Court failed to correct the mis-impression conveyed by such statement. (3) The instructions of the Court failed to properly set out the law to the jury, in that they were confusing and improperly comingled the principles of negligence and unseaworthiness."

Petitioner has not cited or quoted any case from another Court of Appeals which collides with the Fifth Circuit's Opinion. In fact, the Circuit Court's decision is fully supported by ample authority. In *Realty Investment Co. vs. Armco Steel Corporation,* (8 Cir. 1958) 255 Fed. 2nd 323, it is stated:

> "* * * * A summary judgment upon motion therefore by defendant should never be entered except where the defendant is entitled to its allowance beyond all doubt; only where the conceded facts show defendant's right with such clarity as to leave no room for controversy; with all reasonable doubts touching the evistence of a genuine issue as to a material fact resolved against the movents; giving the benefit of all reasonable inferences that may reasonably be drawn from the evidence to the party moved against."

Petitioner claims to have adopted Respondent's version of the accident thereby supposedly eliminating all "controversial issues of fact". (B 19) This argument cannot stand the test of many favorable inferences which can be deduced from the testimony. The facts upon the motion were essentially the same as stated in the Court of Appeals Opinion. They present a situation which, when taken in the light most favorable to Respondent, warrant a finding that the vessel was seaworthy, that the over-ride was not the approximate cause of the accident. Little himself was the sole cause of the accident, and Little was contributorily negligent.

If this is what Petitioner is stipulating to in supposedly removing all actual conflict, no further argument is necessary. Petitioner has demonstrated no ground for granting his petition for certiorari on this point.

B. UNSEAWORTHINESS

Upon Appeal, Petitioner claimed the ROVING GAMBLER was unseaworthy as a matter of law because of the common occurrence of the over-ride on the ship's winch and failure to provide an adequate crew. Petitioner has *apparently* limited his argument here to "conflict" on the question of unseaworthiness as a matter of law because of the occurrence of the over-ride condition on the winch cable. (B 7-8; 20, 29-30) The Circuit Court of Appeals held:

> *"The over-ride.*
>
> The jury had abundant evidence to find that an over-ride, in itself, was not dangerous. There was testimony that the most that could happen when an over-ride occurred was that the nets or the doors might come up out of the water unevenly, but that this difference in the location of the doors, even if it amounted to four or five feet, had no significant effect on the shipping operations or the equipment and was in no wise dangerous to the vessel or its mission. Plaintiff testified to the contrary, that the nets would be "torn wide open" if the doors came up unevenly, and there was other testimony that if the nets came up unevenly it was likely to throw the vessel off course. The jury had the right to resolve this conflict in the testimony against Plaintiff and, therefore, the right to believe that an over-ride was not an inherently dangerous condition that *required* correction. There was no evidence that the over-ride aboard the ROVING GAMBLER which Little tried to correct, was in any way a unique type of condition. It appears that an over-

ride may occur as a normal incident to the use of shrimp trawler winches. Counsel had directed our attention to no authority to support the proposition that this mere possibility of an over-ride created an unseaworthy condition as a matter of law. In the face of abundant evidence that over-rides were neither dangerous nor a condition that demanded correction to permit continued operation and completion of the vessel's mission, we are not willing to so hold.

* * * * * *

The rationale behind the doctrine of unseaworthiness is to protect seamen from dangerous conditions beyond their control. Common sense says and pure mechanics confirm that if Little had not jury rigged the vertical levers which controlled the power to the winches so that these levers did not have to be held continuously by hand to keep the winches turning, he would not have been injured. If Little's jury-rig had not locked these levers and hence the power to the winches, then the instant his foot touched the winch and he released his hold on the vertical levers the pull of the nets would have stopped the turning of the winch. His injury was attributable to his own contrivance, not to the machinery provided or procedures prescribed by the vessel. Had Little's jury-rig been part of the regular equipment on the vessel, or had some other member of the crew installed the jury-rig, the problem would be different. But here Little created his own danger and effectively caused his own injuries. The proof shows that the captain had no knowledge of the use of the jury-rig until he rescued Little. We recognize that a ship owner has been held liable under the doctrine of unseaworthiness even where he supplied a seaworthy vessel and proper appliances and crew, but an officer or crew member negligently rigged a device or appliance so as to render it temporarily unseaworthy and another crew member was injured. *Mocuilli v. U. S.*, 387 U.S. 237, 87 S.Ct. 1705, 18 Law Ed.2d 748 (1967) and the

cases there cited. *C.f. Antoine vs. Lake Charles Stevedores,* 376 Fed. 2d, 443 (Fifth Cir. 1967); *Rovichaux vs. Kerr McGee Oil Industries, Inc.* 376 Fed 2d, 447 (Fifth Cir. 1967). What we are unwilling to announce here or apply is a new variation of that rule which would allow recovery for a condition of temporary unseaworthiness deliberately brought about without the ship owner or captain's knowledge, by the same seaman who then injures himself upon the very defect he intentionally creates. Under these circumstances the owner did not, as a matter of law, violate his absolute duty to provide a seaworthy vessel."

Petitioner's brief in utilizing a "shotgun" approach periodically claims the ROVING GAMBLER was unseaworthy as a matter of law. No case is asserted to conflict with the Court of Appeals' decision. Each case cited fails to deal with a condition aboard ship which was created by the seaman who was injured because of the condition which he himself created and which was not a part of the vessel's gear, machinery or operating procedure.

The mere citing of cases without stating how they conflict with the decision under review is insufficient.

In *Hussein vs. Isthmian Lines Inc.* (5th Cir. 1968), 405 F.2nd 946, cited by Petitioner, (B 8) it was held that the request of the Hussein to work on a greasy ladder created an issue of fact on the question of seaworthiness. Since the Trial Judge refused to charge the jury on seaworthiness a jury verdict for Isthmian was reversed for a new trial. It is obvious that this case in no way conflicts with the decision under review.

June T Inc. vs. King (5th Cir. 1961), 290 F2d, 404, cited by Petitioner (B 29) held that the stationing of only two seamen on board a shrimping vessel upon which

King was working was sufficient for the trior of fact to find that the vessel was unseaworthy. The judgment for King was affirmed. Again, there is no similiarity between this case and the case sub judice. Conflict has not been demonstrated.

C. STATEMENT OF COUNSEL

Petitioner *intermittently* complains of prejudice in the District Court's ruling and statements in Respondent's opening and closing statements to the jury that Charles Green had done nothing "wrong". (B 21-28; 31). Petitioner contends that there was "no correction" of Respondent's misstatements but in fact the Court approved opposing counsel's remarks thus misleading the jury (B 24). The Court of Apepals' answer to this contention adequately rebutts Petitioner's position:

> "We should view the argument in its context in the overall lawsuit. The setting and the contentions of both of the parties must be considered. In the trial court the plaintiff based his right to recover on one count of neglect or fault and on one count of unseaworthiness - which all concede to be a doctrine of strict liability or liability without fault. The argument is reasonably susceptible of a construction that defense counsel was attacking both the negligence and the unseaworthiness contentions by urging that Green was without "wrong" as to the charge of negligence and that Little's "wrong" in jury-rigging the winch levers (a condition for which Green was not responsible) caused the injury of Little's leg and made the second charge of unseaworthiness untenable; therefore if anyone committed a "wrong" that injured Little, it was Little himself and not Green. But putting the spoken remarks into the broader context in which they occurred is only part of the answer to the error assigned by Little on this point.

Two principal thrusts of Little's objections were that the remarks incorrectly stated the law and that the attorney for the defense was usurping the court's function by telling the jury the law applicable to the case. When Little's counsel first objected the Court then and there told the jury that there were two separate legal concepts involved in the lawsuit about to be presented to them for trial and that the law applicable to each concept would be given in the instructions of the Coourt. In closing argument when objections were raised, they were told the same thing - that the Court would give them the law. We must assume that the jurors were responsive to their oaths and took the instructions of the Court seriously and based their actions and their verdict on those instructions. Such a required assumption cuts off speculation that the jury may have been confused by this lawyer talk.

When it came to the instructions themselves, the Court very clearly told the jury that liability for unseaworthiness did not depend upon negligence, fault or blame. In part the charge stated:

> 'Liability for an unseaworthy condition does not in any way depend upon negligence or fault or blame. That is to say, the ship owner or operator may have exercised due care under the circumstances, and may have had no notice or knowledge of the unseaworthy condition which proximately caused, if it did, the injury or damage.'

And the substance of this instruction was not given once but twice during the course of the charge. The facts properly proved and the law correctly applied caused plaintiff to lose his case. The result was not produced by the words of counsel opposite. We see no basis in the colloquy footnoted above to overturn this jury verdict."

The Lower Court further charged the jury:

> "Plaintiff has alleged and contends that he has two distinct legal bases for recovery, one of which is based upon the maritime doctrine of Unseaworthiness. I will in the course of my charge, charge, define and distinguish these principles of law as they apply to the evidence presented in this case. * * * * Now it is not necessary for the plaintiff to prove both unseaworthiness and negligence. It is enough that the plaintiff proves either one and if the plaintiff does so to your satisfaction under the evidence, and under the law as will be given in these instructions, then plaintiff is entitled to recover a verdict."

It is evident that Petitioner's argument on the question of whether the Court should grant certiorari is directed towards the merits of the case as opposed to demonstrating why this Court should grant his petition. No case with similar facts or reciting principles of law which conflict with the Fifth Circuit Court's decision in this case is cited. All decisions cited have been carefully reviewed and have been found completely unrelated and inapplicable.

D. INSTRUCTIONS TO THE JURY

On appeal to the Fifth Circuit, Petitioner claimed that the District Court in instructing the jury comingled the principles of negligence and unseaworthiness. Respondent is unable to add to the Circuit Court's findings in its decision in this regard. (A 14-15)

The District Court complied with Petitioner's request after its initial charge to the jury and gave the charges requested by Petitioner. After the second charge, Petitioner's counsel made no objection. The Circuit Court of Appeals found that none of the Court's instructions were erroneous and that Petitioner's counsel failed to object after the second charge, thus violating Rule 51, F.R.C.P. which requires objections to

instructions be made after they have been given to the jury.

Petitioner repeatedly insists that the Circuit Court's opinion violates the principle that one need not object to a fundamental and highly prejudicial error. (B 9; 11-16, 32). This position ignores the finding of the Court of Appeals that no error was found in the Court's instruction, much less a "fundamental error".

As an illustration that Petitioner's contentions are without merit an analysis of *Freifield vs. Hennessy,* (3d Cir. 1965), 353 F 2d 97, cited by Petitioner, (B9), readily discloses the lack of alleged conflict.

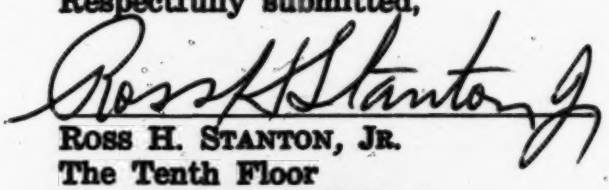
Hennessy, while driving an automobile, was suddenly struck by a seizure causing him to lose consciousness and run over one, Gerald McFall, age five, resulting in the minor's death. Freifield brought suit as Administrator of McFall's estate. The Lower Court instructed the jury that if Hennessy's "blackout" was the result of an "act of God", Hennessy should be exonerated. Freifield's attorney made no objection to the instruction. The Third Circuit Court of Appeals reversed holding that such a fundamental and obvious error could not be sanctioned and no objection to the instruction was required. The facts in this case and the Third Circuit Court of Appeal's ruling is completely unrelated to the facts in the case at Bar.

There has been no demonstration by Petitioner on this point that certiorari should be granted.

CONCLUSION

It is extremely difficult to discern the precise reason why Petitioner believes this Court should grant certiorari. The argument is fragmented to such an extent that argument on the various points attempted to be asserted appears intermittently on the same issue throughout Petitioner's brief. This shotgun approach has failed to demonstrate conflict with another decision of another Circuit Court of Appeal with the decision rendered in the case sub judice. No cases with similar factual or applicable principles of law which have not been followed in this case have been cited in the Petitioner's brief. The petition for certiorari should be denied.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I DO HEREBY CERTIFY that on the 19th day of October, 1970, two copies of the foregoing Brief were furnished by mail to Jacob Rassner, Esq., Attorney for Petitioner, 15 Park Row, New York, New York, 10038.

Ross H Stanton Jr

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